IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO.90 OF 2003

Mrs Farida Phiroz Balsara,)
Age 51 years, Occ. Housewife,)
R/o.B-25, Meherzin,)
109-A, Wadehouse Road,)
Colaba, Mumbai 400 005.) ...Applicant

Versus

1. Gautam Rajan Kapoor,)
Age 23 years, Occ.Business,)
R/o.4, "Zeernae", 4th Floor,)
St.Andrew Francis Road,)
Bandra (West),)
Mumbai 400 050.)

2. The State of Maharashtra) ...Respondents

Miss S.D.Khot for the Applicant.
Shri Niranjan Mundargi for the Respondent No.1.
Shri Y.M.Nakhwa, A.P.P for the State.

WITH
CRIMINAL APPEAL NO.52 OF 2004

The State of Maharashtra) ...Appellant

Versus

Gautam Rajan Kapoor) ...Respondent

Shri Y.M.Nakhwa, A.P.P for the Appellant.
Shri Niranjan Mundargi for the Respondent.

AND
CRIMINAL REVISION APPLICATION 397 OF 2006

Gautam Rajan Kapoor,)
Age 27 years, Occ. Business,)
R/at.68, St. Andrews Street,)
Bandra, Mumbai 400 050.) ...Applicant

Versus

The State of Maharashtra) ...Respondent

Shri Niranjan Mundargi for the Applicant.

Shri Y.M.Nakhwa, A.P.P for the Respondent.

CORAM : ABHAY S. OKA, J.

DATE ON WHICH JUDGMENT IS RESERVED : OCTOBER 13, 2006.

DATE OF PRONOUNCEMENT OF JUDGMENT : NOVEMBER 09, 2006.

JUDGMENT:

1. These three matters arise out of the Judgment and Order dated 02nd December, 2002 passed by the learned Metropolitan Magistrate, 8th Court, Esplanade, Mumbai in Case No.481/P/2000.

2. In the aforesaid case the first Respondent (Gautam Rajan Kapoor) in Criminal Revision Application No.90 of 2001 was the accused. The allegation against the first Respondent is that in the night between 27th October, 1999 and 28th October, 1999 he was driving Maruti Esteem Car from Cuffe Parade towards Mantralaya. One Chetan Mehta was sitting by his side in his car. When his car reached near Vidhan Bhavan, he was driving the car in excessive speed. As a result, a pedestrian Phiroz Balasar (deceased husband of the Petitioner in Criminal Revision Application No.90 of 2003) was injured due to dash given by the said Maruti Esteem car. The said Phiroz succumbed to injuries sustained in the accident.

3. Charge was framed against the first Respondent for offences punishable under section 304(A), 465 and 471 of the Indian Penal Code and under section 134(a)(b) read with sections 187, 181 and 185 of the Motor Vehicles Act, 1988. The allegation against the first Respondent was of driving the car under the influence of liquor and without possessing a driving licence in a rash and negligent manner thereby causing death of a pedestrian. It was also alleged that he was guilty of forging a driving licence. The operative part of the Judgment and Order dated 02nd December, 2002 reads thus:

> ". The accused is convicted for offence u/sec.134 (a)(b) r.w.187, 181 & 185 of M.V.Act and u/sec.465, 471, 304(A) I.P.C.
>
> . For offence punishable u/sec.134(a)(b) r.w.187 of M.V.Act he is sentenced to pay a fine of Rs.500/- i.d. to suffer S.I. for one month.
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> . For offence punishable u/sec.181 M.V.Act he is sentenced to pay a fine of Rs.500/- i.d. to suffer S.I. for one month.

. For offence punishable u/sec.185 M.V.Act he is sentenced to suffer S.I. for 3 months and to pay a fine of Rs.2,000/- i.d. to suffer S.I. for one month.

. For offence punishable u/sec.465 r.w.471 I.P.C. he is sentenced to pay a fine of Rs.2,000/- i.d. to suffer S.I. for 3 months.

. For offence punishable u/sec.304(A) I.P.C. he is sentenced to suffer S.I. for 3 months and to pay a fine of Rs.10,000/- i.d. suffer S.I. for 2 months.

. Substantive sentence to r concurrently.

. Accused is given set off u/sec.428 Cr.P.C.

. The accused shall surrender to bail.

. On payment of fine Rs.10,000/- be paid to the wife of the deceased Smt.Farida

Phiroze Balsara by way of compensation after appeal period is over".

Thus, the substantive sentence of simple imprisonment for three months was imposed for offences under section 185 of the Motor Vehicles Act, 1988 and section 304(A) of the Indian Penal Code. For all other offences, sentence of payment of fine was imposed and in default, the first Respondent was directed to suffer simple imprisonment.

4. The said order of conviction and sentence passed by the learned Magistrate was challenged by the first Respondent (Gautam Rajan Kapoor) in Criminal Revision Application No.90 of 2003 by filing an Appeal before the Sessions Court. The said Appeal has been dismissed by Judgment and Order dated 10th December, 2004. The Criminal Revision Application No.90 of 2003 has been filed by the widow of the victim praying for a direction that the Appeal preferred by the first Respondent against the order of conviction before the Sessions Court should be heard and disposed of alongwith the said Revision Application. The prayer in the Revision Application is for enhancement of sentence and fine amount. Criminal Appeal No.52 of 2004 has been preferred by the State for the

enhancement of sentence. The Criminal Revision Application No.397 of 2006 is filed by the accused for challenging the order of conviction and sentence.

5. In Criminal Revision Application No.90 of 2003, this court issued notice to the first Respondent-accused on 04th July, 2003. Criminal Appeal No.52 of 2004 filed by the State was admitted on 16th March, 2004 and action under section 390 of the Code of Criminal Procedure, 1973 was ordered to be taken against the accused. In the said Criminal Appeal No.52 of 2004, an Application was made at the instance of the accused being Application No.4591 of 2004 pointing that the accused at the relevant time was in New Zealand and was likely to return to India. A prayer was made in the said Application for stay of warrant issued against the accused. By order dated 25th October, 2004, this Court stayed the warrant for a period of two months. This court directed that immediately after return of the accused from New Zealand he should report to the police and execute necessary bond before the Trial Court. This Court directed that after the requisite bond was signed, the accused will be permitted to go back to New Zealand subject to condition of remaining in touch with the police by fax once in three months. On 05th August,

2005 when the Criminal Revision Application No.90 of 2003 appeared before this court, the Advocate for the first Respondent sought time. The Advocate for the first Respondent stated on that day that it was possible to arrive at an amicable settlement. On 23rd August, 2005 following order was passed by this court.

> "1. This Revision Application was adjourned earlier to ascertain whether there is any possibility of amicable settlement. The learned Counsel appearing for the Respondent No.1 on instructions of the parents of the Respondent No.1 stated that the Respondent No.1 is willing to pay compensation of Rs.10 lacs to the Applicant. He stated that, however, the Respondent No.1 will require reasonable time to pay the said amount. He states that by 01st September, 2005 he will come out with a schedule of payment. The learned Counsel for the Applicant stated that the Applicant is ready and willing to accept a sum of Rs.10 lacs as compensation without prejudice to the right of the Applicant to prosecute the claim filed under the provisions of Motor Vehicles Act. The statements of the Counsel appearing for

the parties are accepted. Stand over till 01st September, 2005".

6. On 20th October, 2005, father of the first Respondent filed an undertaking to pay a sum of Rs.10,00,000/- to the Petitioner in the Criminal Revision Application No.90 of 2003 by seven instalments indicated in the said undertaking. On 24th October, 2005, the mother of the accused filed an undertaking to deposit her passport in this court by way of security for payment of all the instalments. Accordingly, the passport was deposited by the mother of the accused. Thereafter on 16th November, 2005, 15th December, 2005, 24th January, 2006 and 19th April, 2006 the Criminal Revision Application was adjourned to enable the parents of the accused to pay instalments. On 08th September, 2006, this court noted in the order that the entire amount of Rs.10,00,000/- as agreed has been paid on behalf of the accused to the Petitioner in the Revision Application No.90 of 2003 as per the settlement between the Petitioner and the accused. Therefore, the passport of the mother of the accused was ordered to be returned.

7. On 13th October, 2006 submissions in all the

three matters were fully heard and the Judgment was reserved.

8. During the course of hearing, the learned Advocate appearing for the Petitioner in the Revision Application No.90 of 2003 stated that the accused has paid sum of Rs.10,00,000/- to the Petitioner and the petitioner has accepted the said amount without prejudice to her right of prosecuting a claim for compensation under the Motor Vehicles Act, 1988 before the Motor Accident Claims Tribunal. She submitted that in view of the payment of lumpsum amount of Rs.10,00,000/- by the accused to the Petitioner, while confirming the order of conviction, the accused can be let off without undergoing substantive sentence of three months imprisonment. The learned Advocate for the Petitioner in Revision Application, however, urged the order of conviction has to be maintained. She stated that in view of the payment of the amount of Rs.10,00,000/- by the accused, she was not pressing Criminal Revision Application No.90 of 2003.

9. The learned counsel appearing for the accused submitted that no offence against the accused has been established. He submitted that in view of private settlement between the accused and the Petitioner in

Revision Application No.90 of 2003 and in view of the fact that the Petitioner i.e. the widow of the victim of the offence has been substantially compensated, the order of conviction and sentence may be set aside. He submitted that at the time of commission of offence, the age of the accused was about 20 years and the incident occurred as a result of carefree attitude of the accused due to his young age. He submitted that at the time of commission of offence, the accused had attained majority but he was not settled in life.

10. The learned A.P.P submitted to the orders of this court in view of payment of substantial compensation by the accused to the widow of the victim.

11. I have considered the submissions very carefully. The accused has filed Revision Application for challenging the order of conviction which has been confirmed in the Appeal. The courts below found that Shri Chetan Mehta who was sitting by the side of the accused at the time of accident deposed in favour of the prosecution by stating thus:

> "At that time a pedestrian who was crossing the road, was knocked down by our car though

> the accused had applied breaks. The force of the car was such that the car did no stopped and pedestrian was knocked down. I asked the accused to stop the car but as the public had gathered therefore we were scared of public hence we did not stopped there and we went away".

12. One Shri Albert Almeda who was the eye-witness supported the prosecution and stated that at the time of accident the vehicle was being driven in very high speed. The courts have, therefore, found that offence under section 304(A) of the Indian Penal Code was established. Moreover, it was found that the driving licence produced by the accused was a fabricated licence. There is a finding recorded on the basis of the report of the Chemical Analyser that certain percentage of alcohol was found in the blood of the accused.

13. It is very difficult to interfere with the findings of fact recorded by the courts below in Revision Application preferred by the accused.

14. As pointed out earlier, only for two offences, substantive sentence of simple imprisonment for three

months has been passed by the learned Trial Judge. As per the said order, fine amount of Rs.10,000/- has been directed to be paid by way of compensation to the widow of the victim. It appears from the order of the learned Magistrate that the accused was arrested on 20th October, 1999 and was later on released on bail and therefore, the learned Magistrate has passed an order for granting benefit of section 428 of the said Code of 1973.

15. The age of the accused at the time of accident was admittedly only 20 years. So far as offence under section 304(A) is concerned, in the case of **Bhalchandra Waman Pathe Vs. State of Maharashtra (1986 Maharashtra Law Journal Page 423)** the Apex Court in paragraph Nos.9 and 10 held thus:

> "9. Dealing with the question of sentence for an offence under section 304A, Indian Penal Code, Beaumont C.J., speaking for the Court, observed in Emperor v. Khanmahomed Shermahomed, (2) that in estimating the sentence to be passed on the accused in a case of causing death by negligence the Court has to consider whether the negligent act which has occasioned the

death shows callousness on his part as regards the risk to which he was exposing other persons. The severity of the sentence must depend to a great extent on the degree of callousness which is present in the conduct of the accused.

10. The trial Court thought that the ends of justice would be met if the appellant was made to pay a heavy fine. **The High Court did not give any reason for coming to the conclusion that a sentence of imprisonment is imperative in this case. The High Court appears to have been influenced by the fact that a human life had been lost. If that is so it had clearly lost sight of the fact that causing death is a necessary ingredient of an offence under section 304A, Indian Penal Code. Yet the Legislature in its wisdom has left it to the discretion of the Courts to punish an offence under that section either with imprisonment or with fine or both. From that it is clear that the Legislature did not consider that for an offence under section 304A, Indian Penal Code, a term of**

imprisonment is a must. On the other hand it did visualise the possibility of an offence falling under that provision being penalised by mere fine. It is highly regrettable that the incident in question resulted in the death of a young person but the High Court should not have allowed itself to be prejudiced by that circumstance".(Emphasis supplied)

16. As stated earlier, the sum of Rs.10,00,000/- by way of compensation has been paid by the accused to the widow of the deceased and the widow of the deceased has accepted the same without prejudice to her right of prosecuting a claim for compensation under the Motor Vehicles Act, 1988. The accused has paid the said amount in substitution of the amount ordered to be paid by the accused under the order of sentence passed by the learned Magistrate. Thus, there is a compliance with the sentence of fine awarded by the learned Magistrate. Now the only question is whether sentence of simple imprisonment for three months for the offences under section 185 of the Motor Vehicles Act, 1988 and section 304(A) of the Indian Penal Code should be maintained. The law laid down by the Apex Court in the case of Bhalchandra

Pathe (supra) is very clear. In the present case the victim's widow has been substantially compensated by the accused by paying a sum of Rs.10,00,000/-. Moreover, the offence was committed by the accused when he was only 20 years old. At that time, the accused had not settled down in life. The incident is of the year 1999. Now he has settled in life. Considering the young age of the accused at the time of commission of the offence and the fact that compensation of Rs.10,00,000/- has been paid as well as other peculiar facts of the case, the substantive sentence of simple imprisonment for three months deserves to be quashed and set aside. It needs to be clarified that receipt of the sum of Rs.10,00,000/- by the widow of the deceased is without prejudice to her right of prosecuting a claim for compensation under the Motor Vehicles Act, 1988.

17. Hence, I pass the following order:

CRIMINAL REVISION APPLICATION NO.397 OF 2006

(i) The order of conviction passed by the Trial Court and confirmed by the Sessions Court is upheld.

(ii) However, substantive sentence of simple imprisonment of three months for the offences punishable under section 185 of the Motor Vehicles Act, 1988 and section 304(A) of the Indian Penal Code is set aside. However, the order regarding payment of fine for the said offences is confirmed.

(iii) In view of the payment of Rs.10,00,000/- to the widow of the deceased, there is a compliance made by the accused/Applicant with the direction for payment of fine under the order of sentence dated 02nd December, 2002.

(iv) Rule is partly made absolute in above terms.

CRIMINAL APPEAL NO.52 OF 2004

. Appeal is dismissed.

CRIMINAL REVISION APPLICATION NO.90 OF 2003

. The Revision Application is disposed of as not pressed.

JUDGE